

**IN THE SUPREME COURT OF THE
STATE OF MISSOURI**

SC085631

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STATE OF MISSOURI**

In the Interest of:)	
)	
STATE OF MISSOURI)	
Ex rel. Tranda Wecker)	
)	
Relators,)	SC085631
)	
vs.)	
)	
THE HONORABLE)	
Steven R. Ohmer)	
)	
Respondent.)	

BRIEF OF RELATOR

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Jurisdictional Statement

Relator's Petition for a Writ of Prohibition was denied by the Court of Appeals on September 22, 2003 without an opinion. Pursuant to Rule 84.24(m), no motion for reconsideration was filed and Relator seeks relief from this Court by requesting the issuance of an original writ. Rule 84.24(m) provides:

If a peremptory writ is denied without an opinion issuing, a motion for reconsideration of the court's action, however denominated, shall not be filed.

Statement of Facts

Relator has filed an appeal, now pending before this Court, of the judgment terminating her parental rights. The style of that case is *In the Interest of K.A.W. and K.A.W.*, SC085683.

On February 8, 2003, in an effort to preserve her right to meaningful appellate review of her termination of parental rights case, Relator filed her Motion to Stay the Adoption Proceeding Pending Review of Appeal. (A. 24-29). At the request of the Court of Appeals, the Guardian *Ad Litem* (GAL) filed a Memorandum Regarding the Status of the Adoption. (A. 30-31). Upon receiving this Memorandum, Relator learned for the first time that the children were ready and the adoption could be completed without delay. (A. 31, paragraph 9). Relator's Motion to Stay the Adoption was denied without opinion in April 2003.

In response to a case adjudicated by the Michigan Supreme Court, *In re JK*, 661 N.W.2d 216 (Mich. 2003) (A. 4-17), Relator sought a Writ in Prohibition from the Eastern District Court of Appeals. (A. 32-50). In response to Relator's Writ, Respondent filed Suggestions in Opposition to Petition in Prohibition, wherein Relator learned for the first time that the adoption had been finalized on April 18, 2003. (A. 51-52). Relator's Petition for a Writ of Prohibition was denied by the Court of Appeals on September 22, 2003 without an opinion. (A. 79).

Pursuant to Rule 84.24(m) no motion for reconsideration was filed, and

Relator now seeks relief from this Court by requesting the issuance of an original writ.

Point Relied Upon

I. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if entered regarding K.A.W. and K.A.W. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator, guaranteed by Missouri Law and the Constitution of the United States, has an ongoing familial relationship with her children until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775 (Mo. 2003)

In re JK, 661 N.W.2d 216 (Mich 2003)

In the Interest of D.S.G., 947 S.W.2d 516 (Mo. App. E.D. 1997)

Howlett v. Rose, 496 U.S. 356 (1990)

Missouri Revised Statute Section 453.011

ARGUMENT

Standard for Issuing a Writ of Prohibition

Generally, writs of prohibition are issued when they fall within one of three categories:

- 1) when there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction,
- 2) where there exists a clear excess of jurisdiction or abuse of discretion such that the trial court lacks the power to act as contemplated; or
- (3) where there is no adequate remedy by appeal.

State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 776 (Mo. 2003). Writs of prohibition are not issued as a matter of right. Rather, whether a writ should issue in a particular case is a question left to the sound discretion of the court in which a petition has been filed. *State ex rel. Nixon v. Campbell*, 2003 WL 22331865, *1 (Mo. App. E.D. 2003). The power to issue a writ of prohibition is limited to correction or limitation of an inferior court or agency that is acting without, or in excess of, their jurisdiction. *State ex rel. Ballenger v. Franklin*, 114 S.W.3d 883, 885 (Mo. App. W.D. 2003). Since Relator is not allowed under Missouri law to appeal the final adoption of her children, the Writ of Prohibition is the appropriate remedy.

Point Relied Upon

I. Relator is entitled to an order prohibiting Respondent from entering final orders in the adoption of or requiring Respondent to set aside said orders if entered regarding K.A.W. and K.A.W. because finalizing the adoption prior to Relator exercising her rights to appeal violates her fundamental rights as a parent in that Relator, guaranteed by Missouri Law and the Constitution of the United States, has an ongoing familial relationship with her children until the appropriate Court considers and determines the merits of her appeal of the decision to terminate her parental rights. Adoptions of children with living parents cannot happen prior to the termination of the parents' rights to raise those children, including any and all active appeals regarding such termination.

The obvious prerequisite to any adoption is the consent of the natural parents or the involuntary termination of their parental rights. *In the Matter of J.F.K.*, 853 S.W.2d 932, 934 (Mo. banc 1993). Relator has the right to appeal her termination of parental rights case. *In the Interest of D.S.G.*, 947 S.W.2d 516, 518 (Mo. App. E.D. 1997). Relator contends that until her appeal is final, her parental rights have not been finally terminated and therefore an adoption should not be finalized.

1. Relator has the right to appeal, a meaningful appeal, to her termination of parental right's case.

Adoption Petitioners and the GAL seem to argue that the holding of the Michigan Supreme Court decision in *In re JK* is inapplicable. 661 N.W.2d 216 (Mich. 2003) (A. 4-17). While it obviously is not controlling precedent in this State, *In re JK* is a clear and concise explication of the due process principle that “the circuit court [should] not [be] permitted to proceed with an adoption following a termination of parental rights where the parent’s appeal of that decision remains pending.” *Id.* at 218.

The fact that Michigan had a statute and/or rule staying an adoption until the finalization of an appeal of a termination of parental rights was not dispositive in *In re JK*, nor would the absence of such a provision in Missouri be dispositive here. The Michigan Supreme Court went further in its decision to state that “to allow such an adoption to occur” would distort the review process of the state’s courts. *Id.* at 225. “Parents whose rights have been terminated by the trial court are entitled to appellate review of [that] decision without that review being compromised by the specter of appellate courts having to undo an adoption as a concomitant act to the granting of relief for those parents.” *Id.* Such a result is contrary to the structure of the “justice system established” by the state Constitution and its laws. *Id.*

As in Michigan, Relator has a right to appeal her termination of parental rights case in Missouri. *In the Interest of D.S.G.*, 947 S.W.2d at 518. Since she has the right to appeal, the Missouri appellate courts should not be saddled with the added hurdle of knowing that a reversal of Relator's termination of parental rights would also entail reversing an adoption proceeding for K.A.W. and K.A.W. as a concomitant act to the granting of relief.

As *In re JK* reminds us, Relator's parental rights are fundamental.¹ These rights are protected by the substantive due process guarantees of the federal and

¹ The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Relator's liberty interest, in the care, custody and control of her children, is one of the oldest fundamental liberty interests recognized by the Supreme Court. *Id.* Relator has the right to direct the destiny of her children. *Pierce v. Society of Sister*, 268 U.S. 510, 535 (1925).

The United State Supreme Court has gone further to state that the fundamental liberty interest does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Because the termination of parental rights has been characterized as "tantamount to imposition of a civil death penalty," *In the Matter of the Parental Rights as to J.L.N.; Diana L.N. v. State of Nevada, Dept of Human Resources, Div. of Child and Family Services*, 55 P.3d 955, 958 (Nev.

Missouri Constitutions. Her well established fundamental rights cannot be deemed to somehow carry less weight because she is a citizen of Missouri instead of Michigan. *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

After Relator's rights were terminated on December 11, 2002, the trial court entered a judgment to finalize the adoption of Relator's children. Judgment and Decree of Adoption May 18, 2003. The proceeding was sealed and Relator was not a party to that adoption proceeding. Relator had no way of knowing when, where or the outcome of that proceeding. Relator only learned of the readiness and active status of the adoption proceeding from the GAL in response to Relator's original Motion to Stay the Adoption. (A. 30-31). Relator learned for the first time during her initial attempt at a Petition in Prohibition in the Court of Appeals that the adoption had become final. (A. 52). Even with the knowledge that it was pending, Relator was not entitled to become a party to that action, as the GAL has argued on a number of occasions, nor since the outcome was sealed was she able to file a post trial motion as the Adoptive Petitioners and the GAL seem to suggest. With the understanding that the adoption proceedings are sealed, there was no way for Relator to appeal the final adoption under Missouri law and therefore this Petition in Prohibition is the appropriate remedy.

2002), it is not disputed that state intervention to terminate the relationship between parent and child must be accomplished by procedures meeting the requisites of the Due Process Clause. *Santosky*, 455 U.S. at 753.

In re JK is informative on one additional ground. At oral arguments before the Michigan Supreme Court, it was reported that the county designated the JK case as an “at risk” adoption. *In re JK*, 661 NW.2d at 225, fn 25. The Michigan Supreme Court took this statement to mean that the adoption was labeled “at risk” because the county took a “risk” that the court might vacate the termination, but still went ahead with the adoption. *Id.* The Michigan Supreme Court found that this practice ignored the reviewing courts jurisdiction by allowing the adoption to take place while a timely appeal was pending. *Id.*

Likewise here, the statements made in Adoption Petitioners and GAL’s response indicate that they too rolled the dice. Those parties indicate that “if Relator is ultimately successful on her appeal and, therefore, elects not to consent to the adoption, the Judgment and Order of Adoption will in effect be nullified.” (A. 61). Furthermore they state that “they are prepared, even after any approval of their petition for adoption, to accept the consequences of any ruling,” proving that like the situation before the *JK* court, this Court is likewise faced with a termination of rights case that has the added dimension that Relator is successful in her appeal, the Court must vacate an order that never should have been entered into. (A. 76). As the Michigan Supreme Court held, so too should this Court hold that adoptions cannot be finalized until appeals from termination of parental rights cases have run their course.

2. Adoption Petitioners and the GAL misinterpret Sec. 453.011.

Although opposing counsel has quoted Sec. 453.011 correctly, they ignore the exact language of the Statute that is relevant here: “the permanency of the placement of a child who is the subject of a termination of parental rights proceeding ... not be delayed any longer that is absolutely necessary *consistent with the rights of all parties*...” Sec. 453.011.3 (A. 1)(emphasis added). The Statute thus contemplates that an adoption or other permanent planning must proceed in compliance with the “rights of all parties,” *including* the due process of Relator and other parents faced with termination of their parental rights.

By their choice of language, the Missouri Legislature acknowledged that some permanency placement cases will take longer than others. The Statute provides that the permanency placement must be consistent with the rights of all the parties, including a parent’s right to appeal a termination of parental rights decision. As in Michigan, Missouri law envisions that adoptions should not become final until the “rights of all parties” are guaranteed.

3. Rule 81.09 and 81.10 are inapplicable to this proceeding.

After the judgment terminating Relator’s rights became final, she filed her appeal on January 15, 2003. At that time no adoption had been finalized. In fact, Relator’s appeal had been pending more than three months before orders finalizing the adoption were entered. Once Relator had appealed, the trial court no longer retained jurisdiction of the case. There was no ability for the trial court to rule on

an 81.09 or an 81.10 motion if Relator had filed one. Since the jurisdiction of the case now rested with the appellate court, Relator filed her Motion to Stay the Adoption with the Appellate Court. Procedural facts of the case indicate that Relator tried on a continuous basis to stay the adoption. The motion and the initial attempt for the Petition in Prohibition were both denied by the Appellate Court. Relator then filed with this Court, which has issued a Preliminary Writ.

4. Adoption Petitioners and the GAL mischaracterize Relator's intent in filing this Petition of Prohibition.

Adoption Petitioners and the GAL have stated that Relator's filing of this Petition, and presumably her entire appeal, "reflect[] a serious lack of sensitivity toward the situation in which she has placed" her children and the Adoption Petitioners. (A. 75). Relator has not placed them in any situation; to the contrary, Relator has tried to avoid this situation from the outset by filing the Motion to Stay the Adoption. As was noted by the Supreme Court of Michigan, trying to go back and fix what should have never been done from the beginning is an almost impossible dilemma. *In re JK*, 661 N.W.2d at 218. Relator has asked from the beginning for the trial court not to make final its order in the adoption case until her appeal was final. In the trial court's discretion, it chose to proceed.

Relator acknowledges the need to proceed with the adoption of children in the Missouri foster system in the most expedited fashion. However, that need cannot supercede Relator's fundamental parental rights or the right of a parent to

appeal if those rights have been terminated. Logic dictates that all parties' rights are better protected if an adoption waits until the final resolution to termination of parental rights cases. Relator's intent in filing this Petition for Prohibition is to protect her rights as guaranteed by the Constitutions of the United States and Missouri.

Conclusion

Although a termination of rights or consent, must be sought before an adoption can proceed, the opposite is not true in the State of Missouri at the present time. The trial court in Relator's case knew from January 15, 2003 of her appeal and as of February 8, 2003 of her attempts to stop the finalization of the adoption. Wherefore, Relator prays that this Court enter a Writ in Prohibition prohibiting Judge Ohmer from entering orders finalizing the adoption or, in the alternative, requiring him to rescind any orders which may have finalized the adoption of K.A.W. and K.A.W. in order that Relator's appeal can be considered on its merits and decided by the appropriate Court.

Respectfully submitted,

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Certification of Compliance

Comes now counsel for Relator and certifies that:

1. The brief complies with Rule 55.03 in that it is signed, not filed for an improper purpose, the claims are warranted by existing law, and the allegations are supported by evidentiary support,
2. The brief complies with Rule 84.06(b),
3. The number of words contained in the brief is approximately 2,790 as listed by the word processor the document was prepared on.
4. The disk has been scanned for viruses and it is virus-free.

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